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Petition

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81-760

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

BILL HAMES SHOWS, INC., *Petitioner*

v.

J. J. TAYLOR SYNDICATE #173, ET AL, *Respondent*

v.

BUSTER L. BROWN, ET AL,
Third-Party Defendant-Petitioners

Application for Writ of Certiorari
Bill Hames Shows, Inc.

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QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review in this Application For Writ of Certiorari:

1. Whether the United States Court of Appeals for the Fifth Circuit erred in reversing the jury verdict and judgment for Plaintiff by holding that the hand operated rudder attachment on Plaintiff's aircraft constituted a "major alteration," within the scope and purview of the Federal Aviation Regulations, as a matter of law.

2. Whether the United States Court of Appeals for the Fifth Circuit erred in refusing to include, consider or construe Federal Aviation Regulation 1.1, and its requirement of weighing the effect on flight characteristics and airworthiness, in defining "major alterations."

3. Whether the United States Court of Appeals for the Fifth Circuit erred in reversing judgment for Plaintiff by holding that the determination of the status of an alteration to an aircraft as "major" or "minor" was a determination of law and not a question of fact, and therefore, not to be submitted to the jury.

4. Whether the United States Court of Appeals for the Fifth Circuit erred in reversing the judgment for Plaintiff by holding that the hand operated rudder control attachment was "by definition" a "major alteration" and thereby setting aside the jury verdict in favor of Plaintiff that the attachment was not a "major alteration."

DESIGNATION OF PARTIES
Required by Supreme Court Rule 21

The undersigned counsel of record for Petitioners certifies that the following listed parties have an interest in the outcome of this case.

1. Bill Hames Shows, Inc.
2. J. J. Taylor Syndicate #173
3. Excess Insurance Company
4. Phoenix Assurance Co.
5. Trident Insurance Company
6. Scottish Lion Ins. Co.
7. Mentor Insurance Company
8. London and Hull/Bishopgate Insurance Company
9. River Thames Ins. Co.
10. Ulster Insurance Company for Road Transport
11. General/Ulster Ins. Co.
12. Andrew Weir Ins. Co.
13. Provincial Ins. Co.
14. British Law Ins. Co.
15. New Zealand Ins. Co.
16. Insurance Corporation of Ireland
17. Buster L. Brown
18. Mary H. Brown

One of the Attorneys of Record
for Bill Hames Shows, Inc.

OPINIONS RENDERED BELOW

The opinion, in this case, of the United States Court of Appeals for the Fifth Circuit may be found at 642 F. 2d 179.

The opinion of the United States District Court for the Northern District of Texas, Fort Worth Division, was unpublished, but a true and correct copy of such judgment is attached hereto as Exhibit "A" and incorporated herein for all purposes as if set out verbatim.

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IN THE

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No. _____

BILL HAMES SHOWS, INC., *Petitioner*

v

J. J. TAYLOR SYNDICATE #173, ET AL.,
Respondent

v

BUSTER L. BROWN, ET AL.,
Third-Party Defendant-Petitioners

Application for Writ of Certiorari Bill Hames Shows, Inc.

STATEMENT OF JURISDICTION

This appeal is sought by way of Writ of Certiorari pursuant to 28 USC Section 1254 (1).

This appeal is from a decision rendered by the United States Court of Appeals for the Fifth Circuit on April 10, 1981. Plaintiff's Motion for Rehearing was denied, and the opinion amended, on August 4, 1981.

STATUTES AND REGULATIONS PERTINENT TO REVIEW OF THIS APPEAL

The following federal statutes are pertinent and applicable to this appeal:

1) 49 USC §1303 (The full text may be found in Appendix A)

2) 49 USC §1421a (The full text may be found in Appendix A).

The following federal regulations are pertinent and applicable to this appeal:

Each of the following regulations are Federal Aviation Regulations (F.A.R.), in Title 14 Code of Federal Register.

1) F.A.R. 1.1 "a major alteration means an alteration not listed in the aircraft, aircraft engine, or propeller specifications that might appreciably affect weight, balance, structural strength, performance, power plant operation, flying characteristics, or other qualities affecting airworthiness." (The remainder of F.A.R. 1.1 may be found in Appendix A).

2) F.A.R. 43, 14 CFR 43 including F.A.R. 43 Appendix A (the full text of this regulation may be found in Appendix A attached hereto).

STATEMENT OF THE CASE

This is an appeal from a Fifth Circuit decision which creates a windfall for insurance carriers and renders aviation hull insurance valueless, by expanding the scope of the Federal Aviation Agency beyond its statutory authority.

This is an action on a contract of insurance following the May 8, 1976, crash of Petitioner's twin engine airplane. Petitioner, Plaintiff below, had purchased a contract of insurance on the aircraft from Respondents, Defendants below. The aircraft was totally destroyed,

fatally injuring both occupants. The face amount of the policy was $100,000.00.

The principle facts surrounding this claim, with one notable exception, are undisputed. It is undisputed that the policy in question covered Petitioner's aircraft, that the policy was in force and effect at the time of the crash, that all premiums had been fully paid and that the aircraft was a total loss, with a value in excess of the policy limits.

The insurance policy in question excluded any flight where the FAA Airworthiness Certificate was not in full force and effect. It is undisputed that a Standard Airworthiness Certificate had been previously issued by the Federal Aviation Administration for the aircraft in question. On board the aircraft at the time of the fatal crash was a hand operated attachment to the rudder control pedals. This device was designed to allow operation of the rudder pedals by the pilot's feet, specifically a paraplegic. However, only fully able-bodied and highly qualified pilots were on board the flight in question. The Respondent denied coverage on this claim by taking the position that the attachment constituted a "major alteration" within the terms of the Federal Aviation Regulations, therefore allegedly invalidating the Standard Airworthiness Certificate until the attachment had prior, specific, FAA approval. It is agreed by all parties that a "major alteration" does require specific FAA approval to maintain the validity of a Standard Airworthiness Certificate and that no such specific approval was obtained in the instant case. It is also agreed that if the attachment does not constitute a "major alteration," but only a "minor alteration," then no prior FAA approval is needed

and the Standard Airworthiness Certificate, and the insurance policy, remain valid and fully in effect.

The Federal Aviation Administration's definition of "major alteration" is found in FAR 1.1. That definition, in relevant part, states:

A major alteration is:

> ". . . an alteration not listed in the aircraft, aircraft engine, or propellor specifications — (1) that might appreciably affect weight, balance, structural strength, performance, power plant operation, flight characteristics, or other qualities affecting airworthiness;."

As is readily seen, this definition includes a reasonableness test, that is, might the alteration in question affect flight characteristics or airworthiness of the aircraft. If so, the alteration is a "major alteration" and requires FAA approval prior to flight; if not, the alteration is "minor alteration" and no prior FAA approval is needed.

This definition is completely in accord with the statutory authority for such regulations. The enabling statute is found at 49 USC Sec. 1421. There, the Federal Aviation Administrator is authorized to promulgate and enforce *reasonable* rules and regulations as may be *required in the interest of safety.*

The Fifth Circuit chose to ignore both the statutes and the definition of "major alteration." The Fifth Circuit chose to ignore the evidence offered in the trial court, the verdict of the jury based on that evidence, the judgment of the trial court, and the clear requirements of the Fed-

eral Aviation Regulations as adopted by the terms of the insurance policy in question. Instead, the Fifth Circuit chose to construe only an appendix to FAR 43 which lists those portions of an aircraft where a "major alteration" might occur. The effect of this absolutely absurd construction, or, more aptly, total disregard, of the other regulations will be shown more clearly in the argument portion of this Application.

Therefore, the sole issue in this case is whether FAA approval of alterations or changes to aircraft is needed only where such alteration might reasonably affect the airworthiness or flight characteristics of the aircraft, or, whether such approval is needed for any change, no matter how small, no matter how insignificant, and without regard to reasonableness or any impact on safety. The Federal Aviation Act, the Federal Aviation Regulations, the Trial Court below, and logic compel the former. The opinion by the Fifth Circuit mandates the latter.

ARGUMENTS AND AUTHORITIES

The importance of this Court's accepting this Application lies in the fact that the Fifth Circuit, in its opinion below, mandated that the Federal Aviation Administration step in and control and regulate private aircraft *without regard* to any particular transaction's impact on safety, commerce, trade, or any other legitimate concern. The Fifth Circuit has, in one opinion, attempted to erase long standing Federal Statutes, regulations, and policies. The Fifth Circuit, in its opinion below, has instructed the Federal Aviation Administration to ignore its own statutory basis for authority and to ignore its other properly promulgated regulations. Indeed, the

Fifth Circuit has apparently instructed the Federal Aviation Administration to tremendously extend its already far reaching impact by requiring them to review and approve minute and insignificant changes in an aircraft, without regard to the reasonableness, the safety impact, the economic impact, or any other significance to such change. Furthermore, in so doing, the Fifth Circuit has given a tremendous windfall to the insurance carriers in this case and effectively eliminated insurance coverage for small aircraft operators across the country. This decision should not be allowed to stand.

Federal Aviation Regulations require that an aircraft operator obtain specific FAA approval, prior to flight, following any "major alteration" or "major repair" to his aircraft. Title 14, part 43. (FAR part 43). With this, all parties agree.

There is no requirement, anywhere in the Federal Aviation Regulations, for any such approval following a "minor alteration" or "minor repairs." With this, all parties agree.

The sole dispute between the parties, at the trial court level, was whether or not the attachment of a hand operated rudder control device constituted such a "major alteration."

The authority of the FAA to require specific approval following a "major alteration" has not been questioned. The Federal Aviation Administration's definition of "major alteration" has not been questioned. No action taken or required by the Federal Aviation Administration has been questioned. The administrator of the FAA is required by law to promote the safety of flight of civil

aircraft in air commerce by prescribing and revision from time to time:

> "(1) Such minimum standards governing the design, material, workmanship, construction, and performance of aircraft, aircraft engines, and propellors as may be required in the interest of safety;
>
> (2) Such minimum standards governing appliances as may be required in the interest of safety;
>
> (3) Reasonable rules, and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing and overhaul of aircraft, aircraft engine, propellors, and appliances; (B) the equipment and facility for such inspection, servicing, and overhaul; and (C) in the discretion of the administrator, the periods for and in the manner in which such inspection, servicing and overhaul shall be made . . .;"
>
> 49 USC 1421a.

In compliance with this statutory duty, and in the furtherance of the safety of civil aircraft, Federal Aviation Regulations, part 43, require such inspection and approval of major alterations. Further in compliance with the statutory basis for his authority, the administrator has promulgated FAR 1.1 defining such major alterations. This definition states, in relevant part, a major alteration is:

> "an alteration not listed in the aircraft, aircraft engine, or propellor specifications — (1) that might appreciably affect weight, balance, structural strength, performance, power plant operations, flight characteristics or other qualities affecting airworthiness;"

Petitioner submitted expert testimony from the only living person to have flown the aircraft in question with the device attached. This witness testified that he was a well qualified test pilot, instructor, and aircraft consultant. He testified that, based on his experience in flying this aircraft, with and without the device, there was no effect on:

1) weight,
2) balance,
3) structural strength,
4) performance,
5) power plant operations,
6) flight characteristics,
7) airworthiness, or,
8) safety.

The trial court properly admitted this evidence and submitted the issue to the jury, together with the F.A.A. definition quoted above. The jury found that the attachment *did not* constitute a major alteration. The trial court agreed and entered judgment accordingly.

The Fifth Circuit has, however, totally erased these requirements of reasonableness and of limiting FAA involvement to those operations where flight characteristics, airworthiness or safety might be affected. Instead, the Fifth Circuit has chosen to sacrifice the regulations, and the statutory basis for everything this agency does by awarding a totally unwarranted degree of sanctity to an appendix which does nothing more than list those areas of the aircraft in which the FAA has expressed an interest in reviewing.

It is extremely important to note that it is not whether or not the device in question on this aircraft might affect

flight characteristics, airworthiness, or safety which is at issue. The issue, rather, is whether or not the significance of any alteration, and the effect or lack of effect on safety, flight characteristics, and airworthiness should be considered in determining whether or not FAA action is necessary. It is further extremely important to note that it is not the FAA which has sought to exercise any authority in this case. It is the insurance industry which seeks, to its direct benefit, to artificially expand the authority of the FAA, to your Petitioner's direct damage.

After a thorough search, your Petitioner finds but one case which purports to address this issue, *Arney vs. The United States*, 479 F2nd 653 (9th Cir., 1973). This case dealt with an action against the United States for negligently issuing a flight permit on an unairworthy aircraft. The defense of the United States was that, subsequent to the issuance of the flight permit, the owners of the aircraft had altered the plane by making certain changes in the fuel lines. The specific flight permit in question in *Arney* even contained a provision that "any alteration made to this aircraft during the effective period of this permit shall invalidate this permit." 479 F2nd at 656.

The trial Court, in *Arney*, upheld the United States' Motion for Summary Judgment on the basis that the alteration had invalidated the flight permit. The Ninth Circuit however reversed that decision and remanded the case for trial on the merits. In so doing, the court held:

> "Whether the alteration invalidated the permit, and whether that would bar Appellants recovery herein, are questions of law to be determined after the

> extent and mechanical significance of the alterations have been factually found. Appellees have pointed to no authorities of the FAA to withhold or invalidate the permit for insubstantial or immaterial alterations unrelated to airworthiness or not affecting the safety of the aircraft operations. . . . Nowhere in the record do we have any technical explanation of the impact of the mechanical action upon the fuel system, and hence the airworthiness of the aircraft . . . We would find it incredible to cut off Appellee's liability . . . merely because of an insignificant change not affecting the overall airworthiness of the plane . . . We hold that the permit was not invalidated unless any alteration to the aircraft was substantial and material to the airworthiness thereof, considered in the light of the safety requirements of the act." 479 F2nd at 659.

The above holding is directly on point and directly appropriate for several reasons. First, the court notes the lack of authority of the FAA to act with respect to alterations unrelated to airworthiness or safety. No such authority exists. No such authority was cited by the Fifth Circuit and no such authority has been cited by the Respondent. The insurance policy in question includes the clause that the Petitioner will not fly the aircraft in violation of its Standard Airworthiness Certificate issued by the FAA. If Petitioner did nothing for which the FAA could have invalidated his airworthiness certificate, he has complied with that clause. Any action by an aircraft operator must impact airworthiness or safety before the FAA can become legitimately involved.

Secondly, the court, in *Arney*, noted that the extent and significance of the alteration must be factually found.

It was the province of the jury to make that factual determination. As this Court stated, in *Tennant v. Peoria & Pekin Union Railroad*:

> "It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. That conclusion, whether it relates to negligence, causation, or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." 321 US 29 at 35, 88 2Ed. 520 at 525.

Thirdly, the court notes that it would find it incredible to cut off liability because of an insignificant change not affecting the airworthiness of the aircraft. The insurance company demands, in its policy, that an aircraft owner comply with FAA regulations with respect to maintaining the validity of his airworthiness certificate. This clause reasonably construed means that an aircraft owner or pilot who invalidates his airworthiness certificate by taking some action that materially affects the airworthiness or safety of the aircraft, and hence the risk assumed by the insurers, forfeits his insurance coverage. It cannot be fairly or logically argued that he forfeits such coverage by taking an insignificant action which does not affect the airworthiness of the aircraft, the safety of the aircraft or the degree of risk assumed by the insurance company.

The appendix to part 43 relied upon by the Fifth Circuit in its opinion is nothing more than a list of major areas of an aircraft. The appendix simply states that a change or alteration in those major components is a major alteration. This listing does not remove the statutory authority for the regulation or the limitations contained in the regulations themselves. The Fifth Circuit says that because Appendix A says that an alteration of the control system is a major alteration then the device in question is, "by definition," a major alteration requiring FAA approval. The absurdity of this argument can readily be shown. By the Fifth Circuit's definition, if the change or alteration is attached to, connected with or has anything to do with the control system of an airplane, it is a major alteration requiring FAA approval. Consider, if you will, the yoke, or "steering wheel," of the airplane. Obviously the yoke is an essential element of the control system of an aircraft. In small planes at high altitudes, that yoke may become cold or slippery. Many pilots will therefore have a leather cover wrapped around the yoke. This will help protect the pilot against the cold or slippery yoke. This leather cover is an alteration or change in the aircraft. The same is true of a "push-to-talk" microphone button. Either one is an alteration or change to the yoke and therefore to the control system to the aircraft. The Fifth Circuit's opinion in this case would require FAA approval prior to flying that airplane simply because of this leather cover or mike button. Such a result is absurd and violates common sense. Such is not the regulation or the requirement of the FAA. If it were the regulation or requirement of the FAA, it would clearly violate the statutory authority of the administra-

tor to promulgate such regulations that may be required in the interest of safety.

The statutory authority of the FAA to promulgate the regulations in question are founded upon that agency's duty to promote aviation safety. 49 U.S.C. §1303, 1421. *Starr v. United States* (1975, D.C. Tex.) 393 F. Supp. 1359; *Rauch v. United Instruments Inc.* (1976, 3rd CA); *Citronelle-Mobile Gathering, Inc. v. McLucas*, 432 F. Supp. 821 (1977, D.C. Ala.)

Even if such result was authorized by both the regulations and the statute, which obviously they are not, the result would clearly be an arbitrary and capricious application of governmental powers.

In the *Citronelle* case, *supra*, the Court was asked to review an FAA regulation requiring certain action to be taken on the Plaintiff's plane. The Court held that where the FAA could make no showing that the actions being required were in the promotion of safety, such regulation was arbitrary and capricious and therefore unenforceable. 432 F. Supp. at 827-828.

The Fifth Circuit has attempted to take a very valid, reasonable regulation and construe it to require an arbitrary and capricious result. Fundamental law of construction of statutes requires the opposite approach. *United States v. Bryan*, 339 US 323 at 338, 94 L.Ed. 884 at 894. The Fifth Circuit's decision also violates the long standing rule of this Court that any Court should avoid raising Constitutional questions if it can be done by any reasonable construction of the legislation in question. *U.S. vs. National Dairy Products Corp.* 83 S. Ct. 594, 372 U.S. 29, 9 L. Ed 2d.

This absurdity is further compounded by the fact that it is *not* the government, *not* the FAA, who is seeking such unlimited and unsupported encroachment into private affairs. It is the insurance industry. If the Fifth Circuit opinion is allowed to stand, aircraft hull insurance in this country is worthless. If the insurance carrier can find a leather wheel cover, a coat of paint, a new push button on the microphone, or any other of a thousand possible things an aircraft owner might do to his aircraft, there is no insurance coverage. The aircraft owner, by the Fifth Circuit opinion, is denied the right to even offer proof that his actions have nothing to do with safety, with airworthiness, with flight characteristics, or with the risk assumed by the insurance carrier. The Fifth Circuit opinion takes reasonableness and tosses it out the window.

Petitioner would therefore strongly urge that this Application For Writ of Error be granted, and upon review, the decision of the Fifth Circuit be reversed and the prior judgment of the trial court, and the jury verdict, be reinstated.

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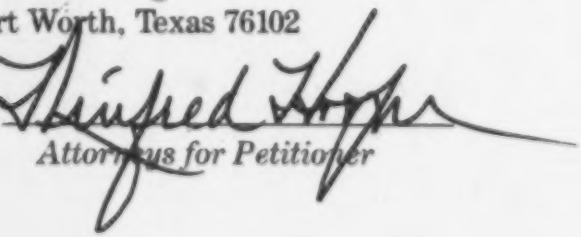
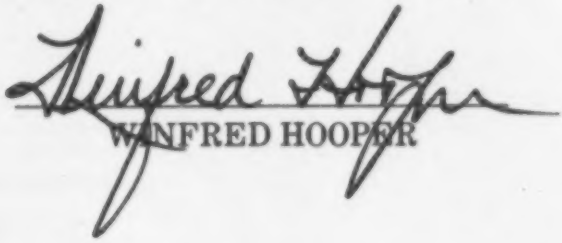
By 
Attorneys for Petitioner

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served on all attorneys of record in this matter on this the 20th day of October, 1981.



WINFRED HOOPER

APPENDIX A

[Filed U.S. District Court, Northern District of Texas, July 15, 1980, Joseph McElroy, Jr., Clerk; by Jeane Alexander, Deputy]

FINAL JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. CA 4-77-103-K

BILL HAMES SHOWS, INC., Plaintiff

V.

J. J. TAYLOR SYNDICATE #173, et al, Defendants and Third Party Plaintiffs

V.

BUSTER L. BROWN and MARY H. BROWN, Third Party Defendants

FINAL JUDGMENT

This action came on for trial before a Court and a jury, The Honorable David O. Belew, Jr., District Judge, presiding and the issues having been duly tried and the jury having duly rendered a verdict for Plaintiff in the sum of $26,264.30 and the Defendant, having moved to set aside the verdict, and for judgment in favor of Defendant notwithstanding the verdict, and the Court having made its order denying said motion on the 1st day of July, 1980,

IT IS ORDERED and ADJUDGED that the Plaintiff, BILL HAMES SHOWS, INC. recover of the Defendants J. J. TAYLOR SYNDICATE #173, EXCESS INSURANCE COMPANY, PHOENIX ASSURANCE COMPANY, TRIDENT INSURANCE COMPANY, SCOTTISH LION INSURANCE COMPANY, MENTOR INSURANCE COMPANY, LONDON AND HULL/BISHOPSGATE INSURANCE COMPANY, RIVER THAMES INSURANCE COMPANY, ULSTER INSURANCE COMPANY FOR ROAD TRANSPORT, GENERAL/ULSTER INSURANCE COMPANY, ANDREW WEIR INSURANCE COMPANY, PROVINCIAL INSURANCE COMPANY, BRITISH LAW INSURANCE COMPANY, NEW ZEALAND INSURANCE COMPANY and INSURANCE CORPORATION OF IRELAND the sum of $26,264.30 with interest thereon at the rate of 9% (NINE PERCENT) per annum from May 8, 1976, and its costs of action.

IT IS FURTHER ORDERED and ADJUDGED that Third Party Plaintiff take nothing and that Third Party Plaintiff's counter action against Bill Hames Shows, Inc. and cross action against Buster L. Brown and Mary H. Brown, Third Party Defendants, be dismissed on the merits, and that the counter Defendant and Third Party Defendants recover their costs from the Third Party Plaintiffs.

Dated at Fort Worth, Texas this 14 day of July, 1980.

/s/ DAVID O. BELEW
Judge Presiding

Approved as to form:

/s/ DOUGLAS R. HUDMAN
Attorneys for Plaintiffs

/s/ DUNCAN CLORE
Attorneys for Defendants

STATUTE

1303. Declaration of policy — Administrator. — In the exercise and performance of his powers and duties under this Act the Administrator shall consider the following, among other things, as being in the public interest:

(a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense;

(b) The promotion, encouragement, and development of civil aeronautics;

(c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both;

(d) The consolidation of research and development with respect to air navigation facilities, as well as the installation and operation thereof;

(e) The development and operation of a common system of air traffic control and navigation for both military and civil aircraft. (Aug. 23, 1958, P.L. 85-726, Title I, §103, 72 Stat. 740.)

* * * * *

1421. General safety powers and duties. — **(a) Minimum standards — Rules and regulations.** — The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance

of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

(2) Such minimum standards governing appliances as may be required in the interest of safety;

(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Administrator, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Administrator may accept in lieu of those made by its officers and employees;

(4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum, hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

* * * * *

FEDERAL AVIATION REGULATION 1.1, 14 C.F.R. 1.1

"Major alteration" means an alteration not listed in the aircraft, aircraft engine, or propeller specifications—

(1) That might appreciably affect weight, balance, structural strength, performance, powerplant operation, flight characteristics, or other qualities affecting airworthiness; or

(2) That is not done according to accepted practices or cannot be done by elementary operations.

"Major repair" means a repair:

(1) That, if improperly done, might appreciably affect weight, balance, structural strength, performance, powerplant operation, flight characteristics, or other qualities affecting airworthiness; or

(2) That is not done according to accepted practices or cannot be done by elementary operations.

* * * * *

"Minor alteration" means an alteration other than a major alteration.

"Minor repair" means a repair other than a major repair.

* * * * *

PART 43 — MAINTENANCE, PREVENTIVE MAINTENANCE, REBUILDING, AND ALTERATION

Sec.

43.1 Applicability.

43.3 Persons authorized to perform maintenance, preventive maintenance, rebuilding, and alterations.

43.5 Return to service after maintenance, preventive maintenance, rebuilding, or alteration.

43.7 Persons authorized to approve aircraft, airframes, aircraft engines, propellers, and appliances for return to service after maintenance, preventive maintenance, rebuilding, or alteration.

43.9 Content, form and disposition of maintenance, rebuilding, and alteration records (except 100-hour, annual, and progressive inspections).

43.11 Content, form, and disposition of annual, 100-hour, and progressive inspection records.

43.13 Performance rules (general).

43.15 Additional performance rules for inspections.

43.16 Rotorcraft Maintenance Manual: "Airworthiness Limitations" section.

43.17 Mechanical work performed on U.S. registered aircraft by certain Canadian persons.

* * * * *

§ 43.1 Applicability.

(a) Except as provided in paragraph (b) of this section, this part prescribes rules governing the maintenance, preventive maintenance, rebuilding, and alteration of any—

(1) Aircraft having a U.S. airworthiness certificate; and

(2) Airframe, aircraft engine, propeller, or appliance of such an aircraft.

(b) This part does not apply to any aircraft for which an experimental airworthiness certificate has been issued, unless a different kind of airworthiness certificate had previously been issued for that aircraft.

* * * * *

In addition to the entry required by this paragraph, major repairs and major alterations shall be entered on a form, and the form disposed of, in the manner prescribed in Appendix B, by the person performing the work.

* * * * *

PART 43—FEDERAL AVIATION REGULATIONS

Appendix A — Major Alterations, Major Repairs, and Preventive Maintenance

(a) *Major alterations* — (1) *Airframe major alterations.* Alterations of the following parts and alterations of the following types, when not listed in the aircraft specifications issued by the FAA, are airframe major alterations:

(i) Wings.

(ii) Tail surfaces.

(iii) Fuselage.

(iv) Engine mounts.

(v) Control system.

(vi) Landing gear.

(vii) Hull or floats.

(viii) Elements of an airframe including spars, ribs, fittings, shock absorbers, bracing, cowling, fairings, and balance weights.

(ix) Hydraulic and electrical actuating system of components.

(x) Rotor blades.

(xi) Changes to the empty weight or empty balance which result in an increase in the maximum certificated weight or center of gravity limits of the aircraft.

(xii) Changes to the basic design of the fuel, oil, cooling, heating, cabin pressurization, electrical, hydraulic, de-icing, or exhaust systems.

(xiii) Changes to the wing or to fixed or movable control surfaces which affect flutter and vibration characteristics.

Appendix

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SUPPLEMENTAL APPENDIX

No. 81-760

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

BILL HAMES SHOWS, INC., *Petitioner*

v.

J. J. TAYLOR SYNDICATE #173, ET AL, *Respondent*

v.

BUSTER L. BROWN, ET AL,
Third-Party Defendant-Petitioners

Application for Writ of Certiorari Bill Hames Shows, Inc.

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BILL HAMES SHOWS, INC.,
Plaintiff-Appellees

v.

J. J. TAYLOR SYNDICATE #173 et al.,
Defendants and Third Party Plaintiffs-Appellants,

Buster L. Brown et al., Third Party
Defendants-Appellees.

No. 80-1888
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit A

April 10, 1981.

As Amended on Denial of
Rehearing Aug. 4, 1981.

Appeal was taken from judgment entered by the United States District Court for the Northern District of Texas, David O. Belew, Jr., J., in action on aircraft insurance contract. The Court of Appeals, Gee, Circuit Judge, held that addition of device permitting hand control of aircraft's rudder, which previously had been controlled by foot pressure on rudder bar or pedal, was "major alteration" within meaning of Federal Air Regulations, and thus such alteration invalidated aircraft's airworthiness certificate until such time as the craft was approved to return to service by Federal Aviation Administration,

and insurance coverage, which required such certificate, was suspended at time of crash.

Reversed and remanded.

Aviation [Key] 10
Insurance [Key] 329.2

Addition of device permitting hand control of aircraft's rudder, which previously had been controlled by foot pressure on rudder bar or pedal, was "major alteration" within meaning of Federal Air Regulations, and thus such alteration invalidated aircraft's airworthiness certificate until such time as the craft was approved to return to service by Federal Aviation Administration, and insurance coverage, which required such certificate, was suspended at time of crash.

See publication Words and Phrases for other judicial constructions and definitions.

Strasburger & Price, Patrick F. McGowan, Dallas, Tex., for defendants and third party plaintiffs-appellants.

Christopher, Bailey & Taylor, M. Ward Bailey, Hooper, Chappell & Broiles, Winfred Hooper, Jr., William R. Brown, Fort Worth, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before GEE, RUBIN and RANDALL, Circuit Judges.

GEE, Circuit Judge:

About four years ago an aircraft belonging to appellee Bill Hames Shows, Inc. crashed while on a test flight.

Being tested was a device designed to permit hand control of the aircraft's rudder, customarily manipulated by foot pressure on a rudder bar or pedal. The underwriters insuring the aircraft refused payment of claims for its loss, claiming the installation of the hand control had destroyed coverage. Suit was filed, and trial resulted in a judgment for the insured and against the underwriters. Decision of their appeal to us turns on whether the addition of this device to the craft was a "major alteration." If so, the airworthiness certificate was suspended, and the insurance coverage, which required such a certificate, was likewise suspended at the time of the crash. A jury found, as a question of fact, that the addition of the hand control was not a major alteration. We conclude, as a matter of law, that it was.

Whether the presence of the hand control contributed to the crash is unknown and irrelevant to our inquiry; the question in this diversity case is whether the insurance was or was not suspended. *Lineas Aereas Colombianas Expresas v. The Travellers Fire Insurance Co.*, 257 F.2d 150 (5th Cir. 1958); *Ranger Insurance Co. v. Bowie*, 574 S.W.2d 540 (Tex. 1978). Deciding that question entails a mental journey that begins in the terminology of the aircraft's insurance policy and ends in the definition of "major alteration" found in the Federal Air Regulations (FAR's).

The craft's hull insurance policy withdrew coverage: "(c) While the aircraft is in flight unless its Airworthiness Certificate is in full force and effect." At the time of the crash the airworthiness certificate contained the following provision, which is in substance identical to the language of FAR 21.181, 14 C.F.R. § 21.181 (1980): "this

Airworthiness Certificate is effective as long as the maintenance, preventive maintenance, and alterations are performed in accordance with Parts 21, 43 and 91 of the Federal Aviation Regulations . . . ." Other portions of the FAR's provide, and the parties agree, that it is only when a *major alteration* is performed that approval of the work by the Federal Aviation Administration (FAA) is required before the aircraft can return to service. FAR 43.3(a), 14 C.F.R. § 43.3(a) (1980) provides:

> Except as provided in this section, no person may maintain, rebuild, alter, or perform preventive maintenance on an aircraft, airframe, aircraft engine propeller, or appliance to which this Part applies. *Those items, the performance of which is a major alteration,* a major repair or preventive maintenance, *are listed in Appendix A.*

(emphasis added). Turning to Appendix A, we find:

> (a) *Major alterations.*
>
> (1) *Airframe major alterations.* Alterations of the following parts and alterations of the following types, when not listed in the aircraft specifications issued by the F.A.A., are airframe major alterations:
>
> (i) Wings
> (ii) Tail surfaces
> (iii) Fuselage
> (iv) Engine mounts
> (v) *Control system* . . . .
>
> (Emphasis added.)

The hand-operated rudder control device in question was attached to the rudder pedals of the aircraft, a part of the control system. Neither the discrete device itself, nor the manner of its installation, nor the aircraft with the

device installed had been approved for service by the FAA at the time of the crash. It cannot be disputed that the rudder control of the aircraft was part of its control system. Nor can it be disputed that the addition of a bolted-on device permitting operation of the rudder by hand as well as by foot was an alteration of this portion of the controls. By definition, that made it a major alteration.

Perhaps the alteration was innocuous to normal operation of the aircraft, perhaps essential and beneficial to its operation by a paraplegic pilot. None of this is to the point. The alteration, being major under the FAR's definition, invalidated the craft's airworthiness certificate until such time as the craft was approved to return to service by the FAA. Before this occurred, it was destroyed. Like the invalid medical certificate in *Bowie, supra*, the invalid airworthiness certificate here suspended insurance coverage. As we said in an analogous case governed by Florida law:

> "An aircraft insurance policy may validly condition liability coverage on compliance with a governmental regulation and, while non-compliance with such a regulation continues, the insurance is suspended as if it had never been in force. There need be no causal connection between the non-compliance and the loss or injury." *Glades Flying Club v. Americas Aviation & Marine Insurance Co.*, Fla. App.1970, 235 So.2d 18, 20.

Hollywood Flying Service, Inc. v. Compass Insurance Co., 597 F.2d 507, 508 (5th Cir. 1979). The same holds true here. There was no issue of fact for the jury, only one of law for the court. The insurance was not in effect

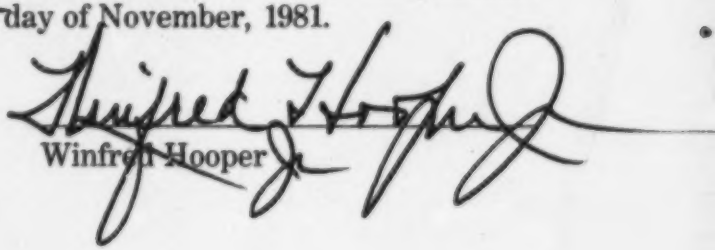
at the time of this loss, and the appellant underwriters must prevail.

The judgments below on the plaintiff's claim and the defendants' and third-party plaintiffs' counterclaim are reversed and the cause is remanded to the district court for further proceedings consistent with our opinion.

REVERSED and REMANDED.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Supplemental Appendix to Application for Writ of Certiorari by Bill Hames Shows, Inc. has been served on Duncan L. Clore, Strasburger & Price, One Main Place, Dallas, TX 75250, attorney for Respondent, on this the 24 day of November, 1981.



Winfred Hooper Jr.

Opposition

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NO. 81-760

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BILL HAMES SHOWS, INC.,

Petitioner,

v.

J. J. TAYLOR SYNDICATE #173, ET AL,

Respondents,

v.

BUSTER L. BROWN, ET AL,

Third-Party
Defendant-Petitioners.

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the addition of a hand-operated rudder control to Petitioner's aircraft without F.A.A. approval suspended the aircraft's airworthiness certificate with the result that insurance coverage was likewise suspended at the time the aircraft was destroyed.

2. Whether or not as a matter of law the hand-operated rudder control device in question on the aircraft was a major alteration requiring approval by the Federal Aviation Administration before the aircraft could be returned to service.

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IN THE

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NO. 81-760

BILL HAMES SHOWS, INC.,

Petitioner,

v.

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Respondents,

v.

BUSTER L. BROWN, ET AL,

Third-Party
Defendant-Petitioners.

BRIEF IN OPPOSITION

The reference to the opinion below is correct. Additionally, since the printing of the Application for Writ of Certiorari the Petitioners have filed a Supplemental Appendix setting forth the Fifth Circuit's opinion in full.

Petitioner's statement of jurisdiction is also correct.

However, Petitioners have not set forth all of the statutes and regulations pertinent to the issues presented for review. For example, Petitioners set forth only part of Federal

Aviation Regulation (F.A.R.) 43. In particular, F.A.R. 43.1 is set forth, but F.A.R. 43.3 (a) is completely ignored, even though it is the linchpin of the Fifth Circuit's opinion.

STATEMENT OF THE CASE

Petitioners' Statement of the Case does not comply with this Court's Rule 21.1(g), which calls for "a *concise* statement of the case containing the facts material to the consideration of the questions presented." [Emphasis by the Court] Most of Petitioners' "statement" ignores most of the material facts of this case and is really an interpretive summary of part of the complex trial testimony. Then based upon the partial summary of facts presented, Petitioners proceed to ignore the basic language in the Fifth Circuit's opinion and instead attempt to make that opinion stand for a ludicrous, over-technical result.

The facts of this case are correctly stated by the Fifth Circuit in its opinion. See *Bill Hames Shows, Inc., v. J. J. Taylor Syndicate #173*, 642 F.2d 179 (5th Cir. 1981). Therefore, Respondents do not consider it necessary to set forth a separate "statement of the case." However, one statement by Petitioners cannot remain unchallenged. At two different places in their brief, Petitioners argue that it is not the F.A.A. which has sought to exercise any authority in this case but rather it is the insurance industry who seeks to artifically expand F.A.A. authority in order to destroy the value of aircraft hull insurance. (See Application pp. 9, 14). What Petitioners fail to reveal to the Court is that the hand rudder-control had been examined by the F.A.A. officials and had been turned down. An F.A.A. aeronautical engineer

testified that this device required F.A.A. approval because it constituted a change in the airplane flight control system, was a major alteration, and in fact the device would not operate the rudder control to the degree necessary to fly the airplane through all maneuvers necessary. (Tr. 215) Moreover, this F.A.A. engineer pointed out that the device would have a major effect if left installed in the airplane regardless of who was flying the aircraft, that the rudder control device would have been a major alteration even if it had been acceptable as it was, or even if it had been the best possible design and worked perfectly. (Tr. 264-67) A second F.A.A. official also testified that the hand-rudder control was a major alteration to the aircraft's control system. (Tr. 310)

In fact, Petitioners' expert witness, who had been Petitioners' chief pilot, although testifying that he had no difficulty with the hand-control that nonetheless he considered the device a major alteration if a paraplegic such as Petitioner Mr. Brown were using the device. This pilot then had to admit that F.A.A. approval for a device of this nature is an approval for the aircraft, as distinguished from approval for the pilot. (Tr. 142-44) Further admissions from this witness show that the fatal flight in question was a test flight of the rudder control device (Tr. 146), that no test had ever been conducted to insure that the device would be able to move the rudder at its certified work load or to determine whether leverage created by the device would produce too much pressure and possibly damage the control system (Tr. 165-66), that Petitioners were trying to get the device approved as a major alteration by the F.A.A. (Tr. 167), and finally that they were having braking problems with the device installed (Tr. 171-72).

REASONS FOR DENYING THE WRIT

Petitioners' Application is arranged more like an appeal on the merits, and it really fails to show that any of the Rule 17 considerations governing review on certiorari apply in this case.

A major purpose of the discretionary certiorari jurisdiction is to allow the Court to review cases involving questions of importance that are in the public interest. See *Magnum Import Co. v. Coty*, 262 U.S. 159 (1923). The importance of the issues must embrace that of the public as a whole, not just the interest of individual litigants. See *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923). But even where an issue is admittedly important, it also must be fundamental and reoccurring and should "reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). This is not true in the instant case, where the facts are such that the Fifth Circuit's opinion is of necessity confined to the unusual situation presented. *See also* Harlan, "Manning the Dikes", 13 *Record N.Y.C.B.A.* 541, 552 (1958).

Indeed, an authoritative American Bar Foundation study bears out the lessening importance of "conflicts among federal circuits or with state supreme courts" as a reason for granting review. During 1958-60, 6.4% of the total applications for review on the Supreme Court's docket were of the type found to be present a "conflict" and were accepted for review. But by 1971-73, that percentage had dropped to only 2.6%. See G. Casper and R. Posner, *The Workload of the Supreme Court* 88, table 4.12 (A.B.F. 1976). Indeed, although the Court's docket grew at a rapid rate from 1958 to 1973, the percentage of cases in which a conflict was even *alleged* substantially declined. *Id.* at 87.

The decline in both alleged and actual found "conflicts" cases coming to this Court is probably due to the fact that the statistics show that the duration of unresolved conflicts after denial of Supreme Court review is relatively short. The A.B.F. study found "only about a quarter of the [conflicts] cases were unresolved after three years." *Id.* at 91.

In our case, Petitioners attempt to justify the grant of a Writ of Certiorari on the basis that the Fifth Circuit's opinion effectively invalidates aircraft hull insurance by setting forth a rule that would allow insurance companies to avoid policy coverage by searching for technical alterations that no one alleges would affect the flight characteristics of the aircraft. However, an examination of the Fifth Circuit's opinion shows that it stands for no such absurd, technical rule. Its opinion *does* stand for the proposition that under the unusual facts of this case F.A.R. 43.3(a), 14 C.F.R. §43.3(a) (1980) applies so that when read in conjunction with Appendix A, as a matter of law the performance of any alterations to the *control system* of the airplane is a major alteration. The Court specifically held:

> "The hand-operated rudder control device in question was attached to the rudder pedals of the aircraft, a part of the control system. Neither the discrete device itself, nor the manner of its installation, nor the aircraft with the device installed had been approved for service by the F.A.A. at the time of the crash. It cannot be disputed that the rudder control of the aircraft was part of its control system. Nor can it be disputed that the addition of a bolted-on device permitting operation of the rudder by hand as well as by foot was an alteration of this portion of the controls. By definition, that made it a major alteration." (Appendix pp. 13-14)

F.A.R. 43.3(a) provides that "those items, the performance of which is a major alteration . . . are listed in Appendix A". F.A.R. 43, Appendix A(a) (1) (v) lists alterations to the *"control system"* as major alterations. F.A.R. 1.1, the general definition for major alterations, defines a major alteration as one "that *might appreciably* affect . . . airworthiness." The F.A.A. in its expert judgment has by issuing Appendix A deemed that any alteration to the plane's *control system* is *per se* an alteration that "might *appreciably affect"* airworthiness and therefore constitutes a major alteration. In other words, once it is undisputed that an alteration has been made, the F.A.A. has already decided that if the alteration is to the *control system* then it *automatically* is a major alteration.

Petitioners have chosen to ignore the express wording of Appendix A and are attempting to give to a jury of laymen the final decision as to whether or not a very specific control modification should be considered major or minor. This flies in the face of F.A.A. regulations and congressional intent. Since under the evidence it is undisputed that the hand held rudder control device was a modification to the control system of the airplane, as a matter of law it *must* be considered a *major* alteration.

Petitioners base their unusual position solely upon the Ninth Circuit's opinion in *Arney v. United States,* 479 F.2d 653 (9th Cir. 1973). Respondents respectfully submit that *Arney* is inapplicable to the facts of this case and involved considerations completely separate and distinct from the situation presented here. *Arney* involved a suit by a pilot and navigator against the government and others for alleged negligence and breach of warranty in the installation, certification and inspection of a ferry fuel system for an aircraft in connection with which a special flight permit had been issued

by the F.A.A. From a summary judgment in favor of the government, the plaintiff appealed contending that fact issues existed precluding summary judgment.

In *Arney,* the court was applying California law and its effect upon the applicability of the government's defense that the plaintiff's alteration of a portion of the fuel system after certification and inspection by the F.A.A. invalidated the special flight permit and constituted negligence *per se.* Upon examination of the evidence, the court held that fact questions existed as to (1) whether the ferry fuel system was defective as originally constructed, (2) whether there was negligence of the government agent in initially granting approval of the ferry fuel system, and (3) whether the alteration in question was the proximate cause of the crash. Construing the government's negligence *per se* defense, the court held that under California law proof of a violation of the special flight permit constituted only a rebuttable presumption of a *per se* violation and that evidence that the plaintiff had acted as would a person of reasonable prudence under the circumstances would be sufficient to rebut the presumption. The Court held that such inquiry clearly involved a question for the trier of fact, in its own right, precluding summary judgment. The Court listed the fact questions to be found; whether or not the changes made to the fuel system were material or insignificant was considered a fact issue with respect to the *causation* of the accident in question. 479 F.2d 658.

Respondents respectfully submit that a reading of the Court's opinion in *Arney* clearly reveals that the language quoted by Petitioners in their brief is *dictum* and is inapplicable to the issues presented in this case. The central question presented in *Arney* was whether plaintiff's conduct in violation of Federal Aviation Regulations precluded

plaintiff's recovery against the government for its alleged tortious acts, and not the effect of any such violations upon insurance coverage, as is present here. Because *Arney* was a negligence case, the court had before it an issue not present in our case and which colored the court's opinion. The court held that if the original fuel system had been negligently installed and certified it was certainly possible that it would have failed regardless of what any alteration to the fuel system might have done. "Thus any alteration may have been causally unconnected with the crash." 479 F.2d at 659.

In the present case, this Court is faced with a dispute between an insured and insurer over the legal effect of actions by the insured upon coverage under its contract of insurance. Unlike *Arney,* where the court was faced under California law with a decision whether an F.A.A. regulation was reasonable as applied in order to determine the applicability under California law of the *per se* doctrine to the government's contributory negligence defense, here no such consideration exists. The question faced by the Court in this case is not, as Petitioners would suggest, whether the conduct of the insured was reasonable under the circumstances, but whether the conduct of the insured violated the terms and conditions of the airworthiness certificate for Petitioners' aircraft.

In its opinion the Fifth Circuit cited Judge Brown's opinion in *Lineas Aereas Colombianas Expresas v. Traveler's Fire Insurance Co.,* 257 F.2d 150 (5th Cir. 1958), where the court held that it would not interfere with the policy language or second guess the insurance company in deciding what factors were of underwriting importance and which if violated would cause policy coverage to cease. Petitioners chose to completely ignore this case in their own brief.

A recent case from the Fifth Circuit that is directly in point and which Petitioners also chose to ignore is *Hollywood Flying Service, Inc. v. Compass Insurance Co.*, 597 F.2d 507 (5th Cir. 1979) (per curiam). There Hollywood sought to recover the insured value of the plane under a policy issued by Compass. The insurance company denied liability on the basis of an exclusion in the policy which, like the one in the case at bar, stated:

> "This policy does not apply .... to any Insured .... who operates or permits the operation of the aircraft, while in flight, unless its airworthiness certificate is in full force and effect."

The case was tried to the District Court without a jury, which ruled that the airworthiness certificate was not in full force and effect at the time of the crash because equipment required to maintain the certificate in effect was not operative in accordance with F.A.A. regulations and the required airplane manual was not aboard the aircraft. The Court recognized that under applicable law "an aircraft insurance policy may validly condition liability coverage on compliance with the governmental regulation and, while non-compliance with such a regulation continues, the insurance is suspended as if it had never been in force." The Court then ruled that "it therefore does not matter that the cause of the crash is unknown and that no causal relationship has been established between the missing manual or the inoperative equipment and the loss of the plane." 597 F.2d at 508.

Although Respondents are of the opinion that the language used by the Court of Appeals is correct and does not conflict with any other circuit court decisions, nonetheless still another reason for denying certioari in this case is that should the writ be granted this Honorable Court would

be required to affirm the lower court's judgment. As mandated by 28 U.S.C. §2111, this Court must render its ultimate judgment "without regard to errors or defects which do not affect the substantial rights of the parties." Should the writ be granted and the Court then examine this case on the merits, the Fifth Circuit's judgment still would be affirmed because the evidence substantively showed that as a matter of law the hand-operated rudder control device was a material alteration which affected the performance of the plane. For example, in addition to other testimony pointed out earlier, one of the F.A.A. inspectors testified that if the Petitioners' aircraft engine failed at low speed that he doubted that the aircraft could continue to be flown. This inspector specifically told Petitioner's agent that the device could not be approved in its present condition and that it would require approval because it was a major alteration. (Tr. 224) Additionally, if the device were not in use and its movement became in any way restricted (such as a book or thermos bottle becoming lodged against the device on the floor), it would have kept the pilot from being able to use the rudder. (Tr. 225-26) Since judgment for Respondents in this case would still have to be affirmed even if this Honorable Court disagreed with certain language used by the Fifth Circuit in its opinion, it therefore would be worthless to grant the writ in the first place. *Cf. F.C.C. v. Pacifica Foundation,* 438 U.S. 726 (1978).

What originally happened in this case could have set a very dangerous precedent for the future. The district court had erred in allowing a jury of laymen to effectively overrule F.A.A. engineers and officials. This case does not involve a cosmetic or non-functional item whose use would not affect the flight of the aircraft and which as a matter of law would not constitute an alteration to the *control* system. This case

involves an intricate paraplegic device that was actually bolted onto the rudder-control pedals of the aircraft. The undisputed evidence shows that two F.A.A. officials turned the device down, that extensive modifications were made to it, and it was being tested by its inventor at the time the plane crashed. Petitioners are forced into taking the position that F.A.R. 43, Appendix A means nothing and a jury finding should take precedence. It is submitted that in *this* case it is so clear that the rudder-control device is a major alteration that the court should not ignore an admittedly valid F.A.A. regulation. The facts do not warrant such a drastic step. Admittedly, the English language is imperfect and even well-drawn regulations may not be drafted so as to exempt a few minor, non-mechanical items, but this is not the case here.

The primary purpose of the Federal Aviation Act of 1958, 49 U.S.C. § § 1301-1542 is to promote civil aviation while assuring maximum safety to the public. See *Doe vs. Dept. of Trans. F.A.A.,* 412 F.2d 674 (8th Cir. 1969), opinion by then Circuit Judge Blackmun, who held that the Federal Aviation Act has emphasis on safety and that the construction of F.A.A. regulations by those charged with administering it are not to be overruled except for weighty reasons. Federal Air Regulations duly published in accordance with law in the Code of Federal Regulations have the force of law. *United States vs. Schultetus,* 277 F.2d 322 (5th Cir. 1960); *Todd vs. United States,* 384 F. Supp. 1284 (M.D. Fla. 1975), *aff'd* 553 F.2d 384 (5th Cir. 1977) (per curiam).

The plane in question crashed while on a test flight of the rudder-control device, with the pilot and the inventor of the device both abroad. It was unfortunate that they were killed and the plane destroyed, but at least the plane went down in an unpopulated area and no innocent parties were injured. It

is true that no one knows the exact cause of the Aerostar's crash, but it really should not matter. The fact that the rudder-control device *may* have affected the control system is the test here; mere attachment of it to the control system without approval violates the regulations. Respondents are in the business of insuring airplanes that meet F.A.A. safety requirements; planes that may be unsafe or used for experimental flights are excluded.

To the extent that Petitioners' Application is an oblique attack on the reasonableness of the F.A.A. regulations, such cannot be considered because it has been raised for the first time before this Honorable Court. Granting the writ would require this Court to examine the reasonableness of those regulations, although neither the district court nor the Court of Appeals was called upon to do so.

CONCLUSION

It is respectfully submitted that Petitioners have wholly failed to sustain their burden of establishing under Rule 17 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in any way which conflicts with applicable decisions of this Court or of another Court of Appeals on the same matter. The Court of Appeals correctly held that as a matter of law the rudder control device in

question was a major alteration which invalidated the aircraft's airworthiness certificate, thus voiding the aircraft's insurance coverage. The Petitioners' Application should be denied in all things.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing Brief in Opposition have been mailed this _____ day of December, 1981, to Winfred Hooper, Jr., Esq., Hooper and Chappell, P. C., 810 West 10th Street, Forth Worth, Texas 76102, attorney of record for Petitioners.

PATRICK F. McGOWAN